

20 MINUTES TO...TRAINED STUDY GUIDE:

ROLE OF THE INVESTIGATOR

Presented by:

Brett A. Sokolow, J.D. and
W. Scott Lewis, J.D.

Materials are adapted from
The ATIXA Playbook



20 Minutes to Trained: Role of the Investigator Table of Contents

- I. Learning Outcomes
- II. Discussion Questions
- III. Case Studies
 - a. Kyle and Bob
 - b. Amy and Billy
- IV. Case Study Questions & Answers
 - a. Kyle and Bob
 - b. Amy and Billy
- V. Excerpt from *The ATIXA Playbook: Best Practices for the Post-Regulatory Era*
- VI. The ATIXA 2016 Whitepaper: *The Seven Deadly Sins of Title IX Investigations*



20 Minutes to Trained: Role of the Investigator Learning Outcomes

- Participants will be able to articulate the advantages and disadvantages of having the investigator make the decision and/or recommendation.
- Participants will understand the importance of treating the investigation itself as a hearing.
- Participants will understand how to recognize their personal biases and tools to utilize to set these biases aside during investigations.



20 Minutes to Trained: Role of the Investigator Discussion Questions

- How much transparency can we/should we bring to our investigation practice?
- How do we go about fostering greater transparency, if more is desired?
- How do civil rights investigations differ from other investigations we perform on campus?
- What should the role of the investigator be in making a decision/recommendation, or being involved in a hearing?
- How can we best assure our investigators are free of conflicts-of-interest?



20 Minutes to Trained: Role of the Investigator Case Studies

Sexting Students

You have just learned that police arrested three students at the middle school, aged 12, for creating and distributing pornographic images of themselves online, via text message, and Snapchat. The images and videos are of the creators themselves (i.e.: nude selfie pictures and videos).

The local news media just picked up the story and is clamoring for a comment. Parents have also started calling the school and district offices demanding to know what is being done to protect their children. The criminal charges are misdemeanors and felonies for child pornography creation and distribution. Police inform the school that they received reports that nude photos of students from the middle school and the high school were shown by the three students to others at the school and were distributed via text and email.

All the students involved are minors and many of the pictures and videos had the location setting on their phones activated, which means they could have allowed predators to locate the homes of those in the pictures and videos.

Kyle and Bob

Bob Thompson, the responding party, a second-year student
Kyle O'Neil, the reporting party, a first-year student

Bob Thompson's Statement

On the night of Friday, September 13th, I went to an off-campus party. There was a band, and a lot of alcohol. I got to the party at about 11:00 pm, and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jami Warren for a while, until I noticed Kyle O'Neil dancing. He was really hot, and I had noticed him on campus a few times. I didn't know if he was into guys but I was willing to find out. I went up to him and we started talking

He seemed a little tipsy and in a pretty loose mood. We talked for a while, and he asked me to get us some more drinks. I think I got him about two or three beers over the next hour.

I didn't have anything more to drink because the three beers I slammed were doing the trick just fine. Around 1:00 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Kyle had a few shots.

We danced a lot, and he had a few more Jell-O shots. He went off to the bathroom, and after that I couldn't find him, and that really bummed me out. I waited around to see if he would show up again, but he didn't. I took off and started to walk back to my residence hall. As I left the party, I heard someone vomiting. I looked over and saw Kyle in the bushes, throwing up. I went over to help him, and he seemed to be in pretty bad shape. I offered to take him home, and he

told me where his dorm was and leaned on my arm. When we got to his dorm, I helped him inside, and was about to leave, but he asked me to come up to his room, just to make sure he got there. I took him upstairs, opened the door for him, and let him in.

He asked me to get him a glass of water, and I did. I started to take off again, but he asked me not to go. When I turned around, he hugged me. We hugged for a while, but he wasn't feeling well, and went into the bathroom. When he came out, he said he felt better, but tired.

We crashed on the couch and then started kissing. I started to massage his back, and he fell asleep. He woke up about 20 minutes later, and started to kiss me, and fondle me. He took off my shirt, and I took off his, eventually we were both naked. I started to give him oral sex, and he said he needed some rest. I asked him if this was OK and if he was OK, and he said he was, he just needed to rest some more. I asked him if he had a condom, and he said he had one in his dresser. I went to get it, and when I got back to the couch, he was asleep again. He woke up after about 20-30 minutes, and I suggested that he just go to sleep. But, he said he felt much better, and started to give me oral sex.

After a while, he put the condom on and we had sex. It was great. Afterward I gave him my number and left. The next day, he called me to ask me why my name and number was on the pad by his sofa. I told him about meeting him at the party, and about our evening together. He seemed to get upset, and said he remembered meeting me at the party, and me helping him back to his dorm but almost nothing else. I asked if he wanted to go out sometime, and he said, "I'm not gay" and hung up on me. Two days later, I was notified by the Dean that Kyle filed a complaint against me, and here I am.

Kyle O'Neil's Statement

It was Friday night and man it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with feelings that I had not recognized before and it's scaring me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and a guy came up to me and started dancing. I'd seen him on campus and thought he was really good looking. No one seemed to be pairing off so it didn't feel awkward.

Over the next couple hours, I had a blast, Bob got me some more beers and then they started passing out Jello shots. I'd never had them before and they were great. I think I had a bunch.

I started feeling really nauseous and hit the can, cause I knew I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Bob came up to me and asked if I needed help. I was so glad for someone to help me get back to my dorm.

I remember us coming in my room and I remember hugging Bob (I don't know why – I think I was just so glad to be back). Then I got sick again. Bob was still there when I came back from the bathroom and he encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Bob. When I woke up I was naked and had a terrible hangover and then I saw a note from Bob. I didn't realize he left me one. I also saw a used condom in the trash. I was so confused and didn't know what had happened. I called him to find out just what went on last night and he asked me out! I'm so upset! What did I do? What did he do? I don't

know if I want to find out, but I know it's bad. He did this to me and I want him held responsible. This whole thing is messing with my mind.

Amy and Billy

Amy and Billy are both students. Amy has filed a complaint against Billy for touching her sexually both in and out of class. Specifically:

- He grabbed her on the butt in the hallway and in class as she was sitting down.
- He has given her “shoulder massages” in class (he sits behind her).
- While they were out with a group, he repeatedly touched her on the buttocks.
- While out with groups at parties, he will come up behind her and press himself against her and/or put his arms around her and hug her from behind without consent.
- When they were alone, he kissed her without consent, and touched her repeatedly on her breasts without her consent. This has happened twice.

They have a mutual group of friends that they spend a lot of time with.



20 Minutes to Trained: Role of the Investigator Q & A

Sexting Students

For Discussion

- How does your investigation proceed in light of the criminal charges?
 - Communication – and cooperation – with law enforcement should be a priority. Will you proceed with your investigation simultaneously? Will you share certain pieces of information? Who are the point people? Routinely touching base with the police is a good practice to ensure you are up to date with relevant information.
 - Does your institution have a MOU with local law enforcement? If not, consider drafting one: having agreed-upon terms in place will help your investigation and your collaboration with law enforcement go much more smoothly.
- What remedies should you provide and to whom?
 - One remedy here should be the education of/raising awareness among the school community about issues relating to this conduct – both the serious, criminal nature of the conduct itself as well as the unexpected potential consequences regarding predators' ability to track an individual's location.

- Another remedy could be a town-hall type meeting with the parents of the students in the middle school to ensure that they also understand the ramifications of this type of behavior.
- How do you address the PR issues?
 - As an investigator, make sure your PR role is delineated. Are you responsible for issuing statements or is that the role of the coordinator? If you are the investigator and you are making a statement, work with the other Title IX administrators to be on the same page regarding how much information to provide to the press. Because there are minors involved, consider FERPA implications.
- What communication should you have with parents?
 - As parents hear of the situation, it makes sense to have a town-hall type meeting to answer general questions – not necessarily about the underlying investigation, but about how your school handles this type of report in general and about educating the student community going forward.
- What is an appropriate sanction if the students are found responsible?
 - There are two main behaviors at issue here. One is the distribution of nude photographs of themselves; and the distribution of nude photographs of others may likely constitute sexual exploitation.
 - Sanctions depend on a) the scale and scope of the conduct; b) whether violation of law is written into your policy as prohibited conduct and c) your institution's sanctioning range.

Kyle and Bob

For Discussion

- What issues do you see here?

- One issue that needs to be handled carefully is Kyle's comfort level and feelings regarding discovering his own sexuality. This issue, while delicate, will enable the investigator to better understand the context and dynamics at issue, as they may – or may not - affect Kyle's account of the night. Understanding the vantage point of the reporting party invariably provides the investigator with a more complete picture.
- Intoxication versus incapacitation. In addition to determining whether there is a preponderance to support whether Kyle was incapacitated, the investigator is also faced with the question of what a reasonable person, in Bob's position, would have known regarding Kyle's level of intoxication.
- What do you want to ask Kyle?
 - Where does Kyle keep his condoms? Did Kyle talk to anyone else about the interaction with Bob?
- What do you want to ask Bob?
 - Was Bob concerned about Kyle, given the fact that he had vomited? What did Bob think happened when Kyle went to the bathroom after they got to Kyle's room? Did Bob talk to anyone else about what happened with Kyle (before he learned that Kyle had made a report)?
- Who else do you want to talk to?
 - Other people who were at the party who may have seen and/or interacted with Kyle to better understand his level of intoxication.
 - Other people at the party who may have seen the interaction(s) between Kyle and Bob.

Amy and Billy

For Discussion

- If what she says is true, is this a policy violation? **Likely yes.**
 - Explain why.
 - Performing a sexual harassment analysis, this conduct seems to constitute unwelcome conduct of a sexual nature. Then the question is whether this sexual harassment is quid pro quo, retaliatory, and/or creates a hostile environment. Although not severe, this conduct likely satisfies the persistent/pervasive prong of a hostile environment analysis.
 - What, if discovered, might NOT make it a policy violation?
 - If Amy has reciprocated this type of behavior with Billy, then this conduct may not constitute a policy violation.
- Who should implement the interim measures?
 - Generally, the Title IX Coordinator – or other designee, and *not* the investigator, should be responsible for implementing the interim measures.
- What if Amy does not want a no contact order because they have so many mutual friends but she wants you to tell him to cut it out (while you investigate).
 - A no-contact order can, and should be tailored to the specific facts of the situation. An order directing Billy to refrain from physically touching and/or interacting with Amy would be an appropriate interim measure.
 - Another, potentially additional option would be to consider reassigning Billy to a different class section. If there are no class sections, consider directing Amy and Billy to sit in specified seats at opposite sides of the classroom.

Once you begin the investigation, some of Amy and Billy's friends no longer talk to or hang out with Amy.

- Is this retaliatory? Why or why not?
 - **Likely not.** While the friends' conduct may be *because of* Amy's reporting, the retaliatory conduct must also

constitute an adverse action. Social isolation or treating Amy rudely or meanly may be behavior worth addressing informally but likely not conduct that merits discipline.

WHY ARE COLLEGES IN THE BUSINESS OF ADDRESSING SEX OFFENSES?

Sexual politics are front-and-center for higher education as the new administration settles in to its role in Washington. Many are questioning whether the administration will make changes to the enforcement of Title IX, in sharp contrast to the rapid advancement of enforcement and administrative guidance during the Obama administration. Opponents of Title IX are seizing on this opportunity to champion the idea that colleges should not be in the business of addressing sexual violence cases at all. These opponents see sexual violence solely as a criminal matter best handled by the courts. Those who see the necessity of addressing sexual violence in college need to be offering public counterpoint to these opponents, to ensure that the public debate airs all sides of this argument, and to ensure that the true intent of the opponents of Title IX is revealed.

Colleges have addressed sexual violence as a policy violation for more than 30 years. Colleges did not get into the business of addressing sexual violence because of Title IX. Colleges have

“The college process and the criminal process are separate and distinct functions.”

confronted sexual violence since long before the issuance of the seminal Department of Education OCR Dear Colleague Letter on Title IX and Campus Sexual Violence, dated April 4th, 2011.⁷ That letter helped to shape colleges’ responses to sexual violence, but did not create the practice of

addressing this issue by institutions of higher education. The idea that colleges should not be in the business of addressing rape cases is one of the most common platforms on which Title IX opponents stake their claims. Colleges never have and never will address the crime of rape. Nor will colleges administratively address other crimes. Colleges have no administrative authority to address crimes of any kind. Crimes are the sole responsibility of law enforcement agencies.

The college process and the criminal process are separate and distinct functions. Colleges have sets of rules comprising codes of conduct. These rules address behaviors that often have parallels to crimes, but the behaviors themselves are treated as policy violations by colleges. These behaviors include underage drinking, vandalism, theft, hazing, arson, and more. While these offenses may constitute crimes, which may (or may not) be addressed criminally, colleges also address these behaviors as policy violations.

To remain logically consistent, those who argue that sexual violence should not be addressed by colleges *because* it is a crime should argue by extension that all misconduct that is also a crime should not be addressed by colleges. The inconsistency in this position is revealed by the fact that opponents of Title IX single out only sex offenses. Colleges must be able to self-regulate in order to maintain order and safety.

⁷ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>

Opponents of Title IX also suggest that colleges should not be in the business of addressing sexual violence because law enforcement agencies are better trained to address these incidents. While it is true that colleges struggle with difficult sexual violence allegations, so does the criminal justice system, leading to the current status quo, where most victims/survivors choose not to report these crimes to law enforcement officials at all. While any bureaucracy can have corrupting influences, the media tends to highlight the exceptions, without placing them in their proper context, and presents all colleges as incompetent or corrupt at addressing sexual violence. That just isn't the case. If the criminal justice system struggles with sexual violence cases, the tendency to hold colleges to a higher standard than criminal justice authorities is both an unrealistic and an unfair expectation. Consider how the narrative broke down when the *Rolling Stone* article about the University of Virginia was examined carefully.⁸ A UVA dean recently won a \$3 million defamation lawsuit against *Rolling Stone* because of its false narrative of administrative corruption.⁹ If that edited, vetted, and published story of alleged college indifference and institutional betrayal was so dramatically inaccurate, consider how many others are as well.

Despite the prevalence of sexual violence on colleges, criminal conviction rates for these cases remain remarkably low. The Brock Turner sentencing¹⁰ demonstrates that even when convictions do occur, significant flaws in the system remain. Perhaps it is best to acknowledge the reality of the situation: these cases are difficult, regardless of whether they are addressed by colleges or criminal authorities. When allegations of sexual violence proceed through the college process, and not through the courts, we must remember that the victim/survivor wants to go through the college process. Additionally, college policies addressing sexual violence almost always define the offenses differently than criminal statutes do, which further differentiates the college process from the criminal process.

More importantly, colleges regard sexual violence as a form of sex discrimination, the correct legal status under Title IX. Sexual violence is an extreme form of unwelcome sexual conduct. It is a subcategory of sexual harassment, which itself is a subcategory of discrimination based on sex. Similarly, stalking and intimate partner violence on colleges are behaviors addressed not as crimes, but as forms of sex discrimination. Thus, to remove sexual violence as an offense at colleges would cause colleges to be non-compliant with federal law under Title IX. If the opponents of Title IX were to succeed, colleges would address all forms of sex discrimination under Title IX, except when sexual violence occurred. Yet, sexual violence and sexual harassment are legally indistinguishable under Title IX, so how would colleges address some forms of sexual harassment and not others? And, why would colleges refrain from addressing only the harassment that has a parallel in criminal law? The logic of such a position is hard to support when analyzed from this perspective.

Several proposals (e.g., in Washington, D.C.¹¹ and the Georgia State Legislature¹²) have been advanced to address perceived problems with the collegiate approach to sexual violence. These

⁸ For a summary of the entire situation, see: <http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405>

⁹ https://www.nytimes.com/2016/11/05/business/media/rolling-stone-rape-story-case-guilty.html?_r=0

¹⁰ <http://www.cnn.com/2016/09/02/us/brock-turner-college-athletes-sentence/>

¹¹ <https://www.congress.gov/bill/114th-congress/house-bill/3403/text>

¹² <https://www.billtrack50.com/BillDetail/773405>

proposals would require that all acts of sexual violence reported to college officials be referred to appropriate law enforcement for resolution. This sounds reasonable until you acknowledge that the actual effect will not be the referral of all sexual violence in college to law enforcement. The actual result will be that the vast majority of college sexual violence simply won't be reported by victims/survivors at all. Rather than prosecuting more sex offenders criminally, the result will be a significant drop in the number of reported sex offenses. ATIXA believes that sex/gender equity is an inherent good, that colleges benefit from the evolution toward being more equitable communities, and that victims/survivors must have a safe space within those college communities to report allegations of sexual violence.

Instead of using the criminal justice system to make colleges safer, the result of these proposals, if implemented, will be the absolute opposite. In fact, such changes are likely to embolden sex offenders, who will be assured that their offenses are unlikely to be reported. This, in turn, would result in an environment that would be far less safe than if colleges had maintained their own internal resolution systems.

Perhaps that's exactly what those who are opponents of Title IX want: a system where men

“We do not view this as a zero sum game, where providing for the needs of victims/survivors must inherently compromise the rights that attach to those who are accused of sexual violence. In fact, colleges must do both, and they must do both better.”

aren't held accountable for their violence against women?¹³ So, do the opponents of Title IX seek only to reassert male privilege over the autonomy of women's bodies?¹⁴ No, of course not. Some are genuinely concerned that colleges don't afford adequate due process to accused students. Unlike Title IX opponents however, we do not view this as a zero sum game, where providing for the needs of victims/survivors must inherently compromise the

rights that attach to those who are accused of sexual violence. In fact, colleges must do both, and they must do both better.

However, FIRE and other organizations like Stop Abusive and Violent Environments (SAVE)¹⁵ and Families Advocating for Campus Equality (FACE)¹⁶ want full-blown adversarial college hearings with the right to attorney representation and a higher standard of proof than the now-mandated preponderance of the evidence standard. They ignore (conveniently) that turning the college process into the criminal process will have the same chilling effect on the willingness of victims/survivors to report offenses to their colleges as that which currently plagues the criminal justice system. Or, maybe that is exactly their intent? Opponents also ignore the wisdom of the last 55 years of due process jurisprudence, which has resisted imposing criminal levels of due process on college administrative proceedings in the United States.

¹³ While the point here is to address the majority of cases, in which men are typically the alleged perpetrators and women are typically the alleged victims, we in no way intend to minimize or negate the experiences of men who are victims, nor those whose perpetrator was a woman.

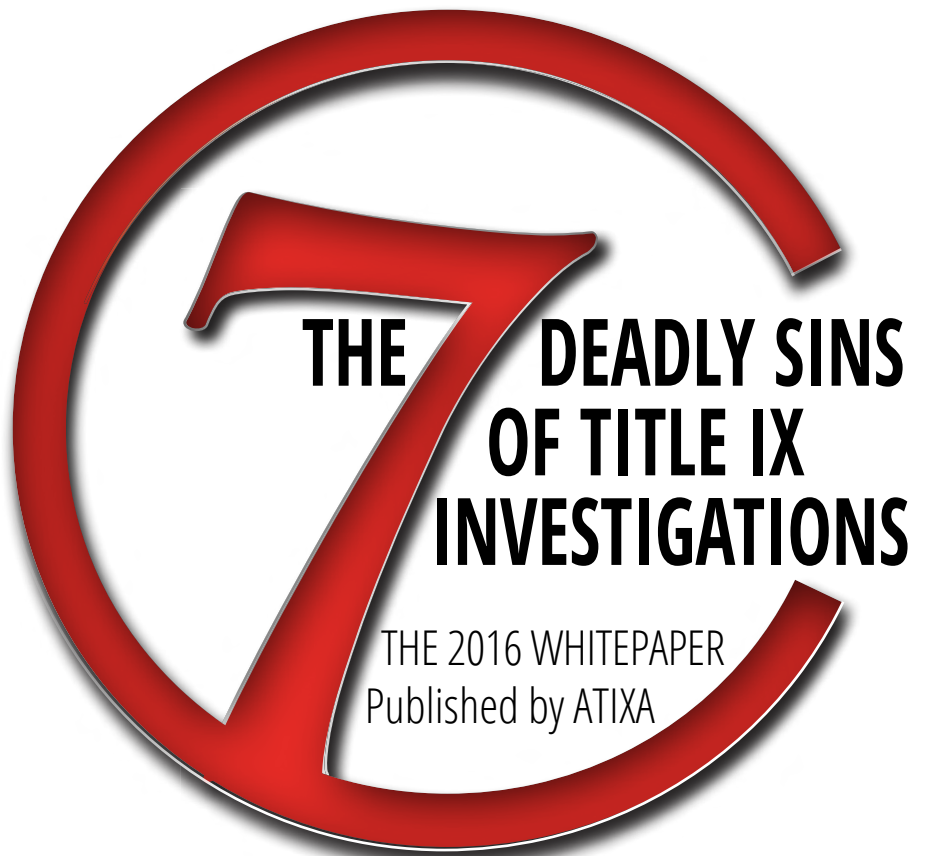
¹⁴ He or she or they or other terms that recognize fluid or non-binary identities.

¹⁵ <http://www.saveservices.org/>

¹⁶ <https://www.facecampusequality.org/>

Currently, students have the absolute right to be advised by counsel during every step of a college's resolution process for allegations of sexual violence. Turning the process into an adversarial one with attorneys pitted against each other only makes sense when analogizing college offenses to crimes and ignores the fact that students already have access to their counsels' advice under existing law. In the United States, employees facing discipline from their employers have the right to consult counsel, but rarely have the right to be represented by counsel in internal disciplinary matters. The same is true for most employees of colleges. Why should it be any different for students facing internal discipline, but no loss of life or liberty?

With respect to the preponderance of the evidence standard, this is a debate that will continue for many years to come. But there are two important points to consider. First, any standard higher than preponderance advantages those accused of sexual violence (mostly men) over those alleging sexual violence (mostly women). It makes it harder for women to prove they have been harmed by men. The whole point of Title IX is to create a level playing field for men and women in education, and the preponderance standard does exactly that. No other evidentiary standard is equitable. Second, "preponderance of the evidence" is the standard used universally in civil rights resolutions in the United States. It is not unique to Title IX. It is the standard for Title IV, Title VI, and Title VII, at the federal level, and for almost all state civil rights laws. It is the standard utilized by OCR and all other federal agencies that oversee civil rights equity. In 2011, when OCR imposed the preponderance standard on schools under Title IX, it wasn't imposing a new standard, it was simply stating the (already existing) fact that preponderance of the evidence is the applicable standard of the courts and of OCR, and thus must be applied by colleges to achieve equitable compliance. No other standard is appropriate because these are civil discrimination protections, not criminal statutes.



Written by:

Michael Henry, J.D.

W. Scott Lewis, J.D.

Leslee K. Morris, J.D.

Sandra K. Schuster, J.D.

Brett A. Sokolow, J.D.

Daniel C. Swinton, J.D., Ed.D.

Brian Van Brunt, Ed.D.

www.atixa.org



ATIXA publishes an extended version of this Whitepaper, with expanded content for ATIXA Members.

To access the 22-page version, please join ATIXA today.

<https://atixa.org/join/>

TABLE OF CONTENTS

Introduction.....	2
1. Failing to Understand and Use Trauma-Informed Investigations and Questioning.....	2
Understanding the Impact of Trauma on a Neurobiological, Physical, and Emotional Level	
Promoting Safety and Support	
Knowing Positive Ways to Respond that Avoid Retraumatization	
Providing Choice with a Goal of Empowerment	
2. Assessing Credibility Ineffectively or Improperly — “Don’t Lie to Me”.....	6
3. Allowing Ambiguity and Assumptions to Rule the Day Rather than Telling a Cogent Story of What Happened.....	7
4. Interpreting the Evidence to Match a Conclusion Rather than Letting the Evidence Lead to a Conclusion.....	8
5. Failing to “Show Your Work” or Gathering Facts without Analysis of Evidence and Credibility...9	
Making the Finding	
6. Being Blind to Personal Biases.....	10
Step 1: Nurture an Attitude of Humility	
Step 2: Nurture Continuous Curiosity	
Step 3: Understand Microaggressions	
7. Failing to Treat the Investigation as a Hearing.....	12
Conclusion.....	13
References.....	14
About the Authors.....	15

INTRODUCTION

For 2016, ATIXA has chosen the topic, *The Seven Deadly Sins of Title IX Investigations*. While there are certainly more than seven fatal mistakes, we honed in on what we feel are among the most common, as well as the most problematic. This whitepaper will address each in turn, provide context and guidance as to how to avoid these mistakes, and improve your policies and procedures to reflect best practices pertaining to civil rights investigations.

1. Failing to understand and use trauma-informed investigations and questioning.
2. Assessing credibility ineffectively or improperly — “Don’t Lie to Me.”
3. Allowing ambiguity and assumptions to rule the day rather than telling a cogent story of what happened.
4. Interpreting the evidence to match a desired conclusion rather than letting the evidence lead you to a conclusion.
5. Failing to “Show Your Work,” or gathering facts without analysis of evidence and credibility.
6. Being blind to personal biases.
7. Failing to treat the investigation as a hearing.

1. FAILING TO UNDERSTAND AND USE TRAUMA-INFORMED INVESTIGATIONS AND QUESTIONING

4 COMPONENTS OF TRAUMA-INFORMED RESPONSE

1. *Understand the impact of trauma on a neurobiological, physical, and emotional level.*
2. *Promote safety and support.*
3. *Know positive ways to respond that avoid re-traumatization.*
4. *Provide choice with a goal of empowerment.*

Imagine that you meet with a reporting party in a sexual misconduct allegation for an initial investigative interview. You are aware that the report involves allegations of unwelcome sexual contact occurring two nights ago, and that both parties were using alcohol and possibly drugs. You wisely prepared for this interview by reviewing your school policy and outlining your questions.

When the reporting party, Kai, arrives, you start the interview by asking why Kai hasn’t reported this incident to the police, and suggest that would be a good idea. As Kai describes the incident, you jump in with clarifying questions, trying to drill down on the details and establish a timeline of the night. You are having difficulty understanding why Kai remembers some parts of the night so clearly, and other parts not at all, so you press Kai to fill in some of the gaps. Kai is unable to share a clear account of what happened, and you become concerned that Kai’s credibility may be an issue.

You learn that the reported incident took place in the restroom at a bar, and now you’re wondering why Kai didn’t ask someone for help or just leave. When you ask, Kai doesn’t really have an answer, so you make note of that. You also note that Kai doesn’t appear upset at all, but seems pretty distant and a bit put off, and that, too, strikes you as odd. After all, if this had just happened to you, you’d probably be crying and would be grateful that the school wanted to help. You certainly would have left the restroom and called the police.

You ask where the drugs came from, but Kai refuses to answer. You know it’s your job to be impartial as an investigator, but Kai’s demeanor and memory issues make a negative impression on you. At the conclusion of the interview, you thank Kai for meeting and say you’ll be in touch. You continue with your investigation. A week later, you contact Kai to schedule a

follow-up interview, but you don't receive a reply. Ultimately, you prepare your investigative report, noting your concerns about Kai's credibility and demeanor.

At first glance, it may seem that you did a sound job. After all, you got Kai in for an interview quickly and worked hard to establish a linear account of what occurred. In fact, you have utterly failed, and committed the first deadly sin. Your approach was not *trauma-informed*. Investigators must understand how trauma may impact reporting parties, and must be able to deploy trauma-informed investigations.

Individuals who have been exposed to an event that creates a real or perceived threat to life, safety, or sense of well-being and bodily integrity may experience the event as a trauma. Sexual violence, relationship violence, and stalking can all create this threat or sense of threat and various factors contribute to how and whether individuals experience trauma as a result. In addition to the nature and severity of the incident, contributing factors can include personality, resiliency, prior victimization, and the availability of a support system.

Recognizing the potential for trauma, federal guidance has increasingly emphasized that school officials responsible for campus resolution procedures should be trained on the effects of trauma and on how to administer a resolution process that is trauma-informed. In its 2014 guidance, the U.S. Department of Education's Office for Civil Rights indicated that all persons involved in implementing a school's grievance procedures should have training or experience in the effects of trauma, including neurobiological change.

“Recognizing the potential for trauma, federal guidance has increasingly emphasized that school officials responsible for campus resolution procedures should be trained on the effects of trauma and on how to administer a resolution process that is trauma informed.”

As investigators, this paper's authors employ a trauma-informed interviewing style not only because we are required to, but because doing so helps us gather more complete and more reliable information from reporting parties. Interacting with reporting parties in a manner that

demonstrates awareness of and sensitivity to the impact of trauma helps to create an interview environment where they are more likely to provide an unfiltered account of what occurred, including very personal and sometimes embarrassing details. In addition, experiencing trauma has counter-intuitive implications for how someone responds in the midst of a threatening event and following the event, and it is critical that we understand this.

Trauma-informed investigating and interviewing include the following key components: 1) understanding the impact of trauma on a neurological, physical, and emotional level; 2) promoting safety and support; 3) knowing positive ways to respond that avoid retraumatization; and 4) providing choice with a goal of empowerment. Each of these are covered here at length:

Understanding the Impact of Trauma on a Neurobiological, Physical, and Emotional Level

Investigators should have received training on the neurobiology of trauma; that is, on how the brain responds to trauma by releasing chemicals into the body in response to the actual or perceived threat. This chemical “surge” is autonomic, and can't be controlled. It impacts individuals' response to a perceived trauma in the moment, and may corrupt recall of the event. As a result of the chemical surge, the ability of reporting parties to fight or flee the threat is impacted, which is why we often hear descriptions of freezing and being unable to move during an assault. This is called tonic immobility. It is also critical to understand that the chemicals released into the body may stay in

the body for 96 hours, and a triggering event (such as your interview) can reactivate this response.

KEY POINTS

- » *The body responds to trauma or perceived trauma by releasing a surge of chemicals that can stay in the body for up to 96 hours.*
- » *Questioning about a traumatic event can reactivate this neurobiological response.*
- » *This surge of chemicals may help explain delays in reporting, unexpected emotional affect, non-linear accounts, and fragmented memories.*
- » *Giving reporting parties a couple of sleep cycles before interviewing them may help by allowing time for the chemicals in the body to subside.*

The chemical surge may help explain why reporting parties' emotional state may seem counterintuitive. For example, if the brain responded to the trauma with a surge of opioids, it would result in a reporting party displaying a flat or even disinterested affect. Inappropriate laughing, conversely, can also be common. These responses can't be controlled, as they are the result of the body's defense mechanisms and whatever chemicals the brain decides to release, which are different for each person and circumstance.

It is also crucial to understand that the encoding and grouping of memories is negatively affected when individuals are experiencing a trauma. Because of this, we should anticipate non-linear accounts, with jumping around and fragmented memories. When we press reporting parties to fill in gaps, we actually may do a disservice by causing them to speculate about details they don't have, which can create credibility concerns later. It can take up to 200 days for the brain to retrieve and reorganize the information from a traumatic event into something cogent, which is one reason why there may be a delay in reporting. What's happened still isn't fully clear to the person it happened to. When alcohol is a factor, memory may be further impacted, and answers to narrow and detailed questions will be difficult for reporting parties to access. Attempting to do so may create additional stress. Key interview techniques that reflect the neurobiology of trauma include allowing for one or two sleep cycles prior to interviews, which may bolster the ability to connect memories, and using strategies that pull out fragmented memories, such as tapping into the senses of smell and sound.

Asking individuals what happened may be less effective than asking them how it made them feel, as the feelings may help to decode memories of what caused the emotions. Most importantly, investigators should be patient and recognize that recall can be slow and difficult as a result of how memories are consolidated in the brain, and pressing reporting parties may actually have a deleterious impact. If you are frustrated with gaps in reporting parties' accounts, or their inability to retrieve details, don't show it. They are likely frustrated as well, and won't understand why they can't recall.

We see many reports of drugging on campuses, yet drugging is a relatively rare occurrence. Naturally, survivors jump to this conclusion, though, when they can't otherwise explain the gaps in their memories. A truly cogent account of a recent incident from reporting parties is nearly impossible, but we also find that reporting parties are motivated to fill in gaps they recognize so that we don't doubt them, even if they aren't as sure of the details as they portray themselves. In one recent allegation, a reporting party asserted that she had said "no" six times during an incident. It's likely she said "no" repeatedly, but that she said it six times is much more likely gap-filling than actual recall.

Promoting Safety and Support

The Title IX coordinator should ensure that reporting parties are aware of sources of support such as counseling and advocacy, and should identify who is available to consult on a safety plan, if one is needed. Investigators have a hand in creating an interview environment that feels safe. One way to do this is to be cognizant of the interview setting by providing a comfortable space that affords privacy to reporting parties. For example, pay attention to their basic needs by having water, coffee/tea, and tissues available, and by making sure the room is a comfortable temperature. Consider having interviews in a neutral location that will not draw attention to reporting parties as they enter or exit. Making stress balls or stuffed animals easily available can make a huge difference, in our experience.

“At the outset, you should be clear about your role, the fact that you are impartial, and about what the school process can or cannot accomplish, while still conveying sensitivity and empathy for the fact that the reporting parties feel harmed or violated.”

You can also promote safety by building rapport and trust while still maintaining your impartiality. It is important for reporting parties to know who you are and what your role is. You should also spend some time getting to know them as individuals, and not just as victims. This can be as simple as learning about how they came to attend or work for the school. This isn't "small talk," but a sincere desire to connect with them before questioning. It is important to allow reporting parties to self-identify, so avoid assumptions about gender and sexual orientation.

Providing transparency and predictability also helps to promote safety. At the outset, you should be clear about your role, the fact that you are impartial, and about what the school process can or cannot accomplish, while still conveying sensitivity and empathy for the fact that the reporting parties feel harmed or violated. Be clear about what you can share and what you can't, and how often you'll communicate with them throughout the process. Bookend interviews by road mapping what happens next and how they wish to be contacted by you for updates. Keep them informed as the investigation progresses, if they desire that.

Knowing Positive Ways to Respond that Avoid Retraumatization

Negative or blaming responses can cause real damage to individuals who may have already been harmed, often causes reporting parties to shut down and, in some cases, drop out of your process. Avoid this by being strategic and transparent in your questioning. If you need to ask about alcohol and drug use, or about previous sexual encounters, explain why. Explain amnesty so that talking about alcohol/other drugs isn't a barrier. It is the job of investigators to think critically about allegations, which means asking for details, clarifying vague statements, and pushing back at times. When you ask challenging questions, communicate why you are doing so, and pay attention to your tone and facial expressions. Be strategic; always consider why you are asking a question. Questions that serve your curiosity but don't further an investigation should be avoided. Even if reporting parties are highly educated, ask questions in simple language, because while they are in crisis, they may struggle to follow more complicated language or compound questions.

Responding positively also means simply paying attention to the reporting parties. You should summarize what you think you heard them say and repeat it back. This demonstrates that you are listening and that you understood what was said. Also, pay attention to their nonverbal cues. If they are disengaging or becoming increasingly anxious, this may be sign that you need to slow down, take a break, or shift your line of questioning. If you trigger something inadvertently, back off or withdraw the question. You can always come back around to it later in a different way. If you have to ask something that is potentially triggering or blaming, own it and be transparent about it. Consider the least triggering way to ask. For example, if you suspect that a reporting party felt trapped, and you want to establish that for the record, you might ask, "Did you try to leave?" However, if the reporting party didn't try to leave, this can feel blaming. Instead, you might ask, "Can you recall what options you considered when he closed the door behind you?" This is a more neutral question and might get you the information you seek without the subtly blaming potential implications of that line of questioning.

Providing Choice with a Goal of Empowerment

Individuals who have experienced trauma feel they have lost control over the situation, and the ability to reestablish a degree of control is crucial for healing. Even reporting parties who appear

poised and collected may be internally dysregulated. This is one of the reasons we usually start interviews with broad-based, open-ended questions that provide individuals control over how they share their accounts. Questions like, “What can you tell me about what happened?” and “Where would you like to start?” leave reporting parties in control. When you need to follow up, soft-approach questions such as “Can you tell me more?” and “Can you help me understand?” are useful.

If they made what you think was a poor decision, they’re probably already thinking the same thing. That sense of self-blame won’t help you uncover the real facts, and you should try to help them past it. People can make poor choices and still be victimized. Worse, if you decide to point out poor decisions, you gain nothing and risk alienating the reporting parties. Be sensitive to the fact that although defining or labeling their experiences may ultimately be part of your job, doing so at the investigative phase takes control away from them.

If reporting parties choose not to report to the police, respect that as their choice. You might be able to give them amnesty for drug use, but the police may not. Finally, remember that if reporting parties request a delay in your process for some reason, you can often honor that, document it, and return to your investigation when they are ready to proceed.

2. ASSESSING CREDIBILITY INEFFECTIVELY OR IMPROPERLY — “DON’T LIE TO ME”

Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence. When source, content, and plausibility are strong, credibility is strong. Credibility exists on a 100 percent point scale, with the most credible evidence being 100 percent, and the least credible being zero percent. Most evidence lies somewhere in between. A low credibility rating alone may not weight the scale sufficiently, as you are trying to determine whether the preponderance of the evidence standard has been met or not. Using the language of the preponderance standard as a means to evaluate credibility indicates that evidence that is less than 50 on the 100 point scale is less credible than more so. Evidence has to be more credible than not to weight the scale at all. If it helps, think of the scale to weight the credibility of all evidence as 0–100; however, the evidence you actually use is really weighed on a scale of 50.01–100, because evidence that falls below 50 carries little weight.

“When source, content, and plausibility are strong, credibility is strong.”

It is important to note that credibility and honesty are not identical constructs, and parties and witnesses can be generally honest, yet provide information that is lacking in credibility or vice versa. Investigators must figure out the impacts of lies, especially when credibility determinations can, on their own, be sufficient to establish that policy was violated. A single lie does not destroy credibility entirely, most of the time. We have to decide if the lie is isolated or enough to undermine the credibility of the interviewee in total. Another consideration is how crucial was the discredited information.

A decision can still be made that an incident occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the incident. Put another way, a preponderance can be established simply because you believe one party and not the other based on the assessment of the credibility of the parties and the evidence provided.

Some aspects of credibility are positional or locational. For example, could witnesses hear what they say they heard? See what they say they saw? Know what they claim to know? Some aspects

of credibility are based on credentials, knowledge, and/or expertise, but those factors need to be established, not assumed. Some aspects of credibility are weighted based on neutrality, impartiality, and objectivity. The more loyal witnesses are based on relationships to one party, the more biased their evidence *may* be. Neutral witnesses may be more objective than partisan witnesses and may therefore be more credible.

Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the facts at issue. Corroboration is not merely a second witness who agrees with the first, because for instance, they could be lying to support each other. Rather, it is evidentiary support for what a witness contends after evaluating source, content, and plausibility. Also, look for subtle bias of which witnesses may not even be aware, including victim-blaming attitudes, group defensiveness (e.g., within teams, organizations, or departments), or whether the witnesses fear getting in trouble. Lack of proximity (in time or geography) detracts from credibility. What was seen in person is most valuable. What was heard from a responding party about an incident after the fact is less so. What was learned after the fact from the responding party's best friend about what the that party said to the alleged victim is even less so. (*See the hearsay analysis in Sin #5 for more information.*)

3. ALLOWING AMBIGUITY AND ASSUMPTIONS TO RULE THE DAY RATHER THAN TELLING A COGENT STORY OF WHAT HAPPENED

An effective and appropriately detailed investigation is like a painting in which the brush strokes tell a story, or even like a 3D image generated with sophisticated software, in which every detail is intricately illustrated. Similarly, a sound investigation must actively gather and accumulate information to tell a story. Investigators make a serious mistake if they only gather part of the evidence or information, either because of discomfort, neglect, assumptions about the usefulness or applicability of additional evidence, or simply because they are overworked.

“A strategic and well-conducted investigation answers questions along the way, filling in the outline to create a three-dimensional picture of the reported conduct.”

We see many investigators who have a tendency to allow witnesses or parties to provide ambiguous answers, or to not fully answer questions. This can occur for many reasons, such as discomfort asking a clarifying question, particularly if it involves a difficult subject like sexual behavior or drug or alcohol use. There could also be concerns that re-asking a question or noting that an interviewee did not respond fully may be viewed as confrontational or uncomfortable. It may simply be because investigators are focusing on their next question rather than listening intently. Relatedly, many investigators fail to follow-up with initial requests for information to ensure interviewees provide it. Sometimes, it doesn't occur to investigators to ask about important facts during interviews. That's why it is essential to re-view interview notes afterward to identify gaps, and then re-interview individuals to follow up as needed. Otherwise, we're leaving a corner of the painting blank. Complete the image.

We also see investigators misstep in a number of other ways such as only gathering the information given to them by the parties, only speaking with the witnesses provided by the parties, failing to ask for probative information such as text messages or emails, and failing to ask the direct or uncomfortable questions. Widen your scope. Sometimes, investigators who are wearing too many hats may allow their busy schedules to justify cutting corners or taking shortcuts. In many cases, investigators should determine the relevance of evidence once they

receive it, not beforehand, because faulty assumptions could severely skew investigations.

A strategic and well-conducted investigation answers questions along the way, filling in the outline to create a three-dimensional picture of the reported conduct. It also involves ongoing review of the information gathered and ongoing re-calibration of the investigative strategy as more information is gathered, more evidence is needed, more witnesses are identified, and the subtle shading of an interaction is identified.

In one recent case, it was only mentioned during the third interview with the reporting party that she was using a tampon during the alleged assault. This was corroborated by police, who retrieved it from the trash for analysis. Until that point, the allegation seemed like a 50/50 situation, with both parties believable but neither story more credible than the other. The reporting party simply didn't think it was important, and because it was an intimate detail that's not normally the subject of polite conversation, she avoided disclosing it. She did not know that the investigators were looking for just one feather to tip the scale one direction or the other, and that investigators didn't have it. Individuals who know that something happened to them don't always understand what investigators are looking for and the need to convince others that it did. They know it did. This fact turned out, in the context of the other information available, to make it much clearer that the sexual interaction was non-consensual, and the responding party was found in violation. If you need a feather and are looking for it, don't be afraid to ask the parties for anything they can think of that could tip the scales.

4. INTERPRETING THE EVIDENCE TO MATCH A CONCLUSION RATHER THAN LETTING THE EVIDENCE LEAD TO A CONCLUSION

In the previous section, we encouraged investigators to paint a clear picture, or use the investigation to tell a story. But, the story should be that of the parties, not that of the investigators. The fourth of the Seven Deadly Sins pertains to the tendency to jump to a conclusion too soon or to allow assumptions regarding the conclusion to improperly skew investigations.

“An investigator’s duty is not to ‘believe one story over the other,’ but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible.”

The error is often in the analysis, which can be the result of “confirmation bias,” in which subsequent evidence is viewed through a skewed lens that reinterprets it as consistent with investigators’ presuppositions or early impressions regarding an allegation. Often, confirmation bias can result from “first impression bias.” This is when investigators formulate a conclusion or initial *hunch* early in the investigation process based on information such as the initial evidence presented, the affect of a party, or the first couple of witnesses interviewed. The investigators then make up their minds as to what they think happened, and that predetermination then shapes the evidence they *look for*, even subconsciously.

Astute investigators may form these impressions as a hypothesis, but are willing to give them up as subsequent information leads towards new or different directions. While we want investigations to read like stories, they are often more fragmented — a collection of several different pieces of evidence. An investigator’s duty is not to “believe one story over the other,” but to assess each piece of evidence, independently, and as part of the bigger picture, to determine whether the preponderance of the evidence supports a finding of responsible or not responsible.

Let's assume that a reporting party did not present himself well during an investigative interview. He appeared timid, nervous, and unsure, while the responding party appeared confident, well-spoken, and charming. The evidence is straightforward, but it's colored by the fact that the responding party *seems*, for one reason or another, more believable than the reporting party.

This type of situation is fairly common. Despite the evidence, investigators may just not *feel* like an incident happened as alleged, often making statements like, "He just doesn't seem like the type of guy that would do something like that." It is this type of partiality, this type of first impression bias, that may ultimately skew a finding and improperly taint a rationale or interpretation. Salvation from this Deadly Sin lies in investigators' commitment to allowing the evidence to speak for itself without spin or interpretive overlay. Investigators should refrain from speculating as to what a particular piece of evidence *could mean* in their conclusions, though that level of curiosity along the way is valuable.

Investigators must also fight the urge to "make sense of things." It is not uncommon for evidence to be jumbled and irreconcilable. It is investigators' role to use the evidence available to paint as clear a picture as possible, though not by filling gaps with speculation and unsupported theories. Investigation reports should be written in a neutral and impartial manner, with conclusions and findings tied directly to the greater weight of the evidence, rather than by using hunches, gut feelings, and assumptions to fill gaps. Also, investigators should reserve their judgment until it is time to make or recommend a finding, being mindful of interpretation, and letting the evidence — all the evidence — speak for itself in the end.

5. FAILING TO "SHOW YOUR WORK" OR GATHERING FACTS WITHOUT ANALYSIS OF EVIDENCE AND CREDIBILITY

Showing your work:

- » Ensures the best possible decision is made.
- » Provides transparency to the parties.
- » May reduce the likelihood of litigation from unsatisfied parties.

Gathering facts and evidence *without* putting them through an analysis based on the type of evidence and the credibility of the parties makes us vulnerable to engaging in a negligent process. This sin is similar to the fourth, in that sometimes investigators fail to articulate their analysis in the report or final outcomes *because* they have reached a conclusion on the basis of their feelings and/or experience, rather than the evidence. We are transitioning out of the era when, for a finding, we would simply write, "We find the party not responsible on the basis that the evidence presented did not show a preponderance of evidence that policy was violated," or "We find the party responsible on the basis that it is more likely than not that the policy was violated." Now, we must articulate — in writing — the information on which that decision was actually based. Indeed, the Office for Civil Rights has repeatedly stressed the need for institutions to provide the parties with the finding, the sanction and the rationale.

Making the Finding

Who makes the finding will vary from campus to campus, but the investigators are in the best position to evaluate the evidence, and must play a role in decision-making. On some campuses, they will make the finding. On others, they recommend it to the Title IX coordinator, director of human resources, or director of student conduct. On yet other campuses, a hearing is used, but we continue to be mystified by the rationale for why an investigation and a formal hearing panel are *both* needed, and what the coordinator's role is if the hearing results in a final determination, considering that OCR has said that the coordinator needs to assure that Title IX is satisfied. We wrote about this extensively in a previous whitepaper, "Equity is Such a Lonely Word" (www.ncherm.org/wordpress/wp-content/uploads/2012/01/2014-Whitepaper-FINAL.pdf). If you persist in using the hearing model,

perhaps the role of the hearing should be to determine whether or not to accept the recommendations of the investigators. Any need for a fully adversarial hearing with witnesses must be based on weaknesses in the investigation process, which this whitepaper is designed to help you shore up.

Regardless of who makes the finding, it is imperative to clearly lay out how a determination was reached, and what evidence supports it. Show your work. What do the investigators think? What do they know? What can they prove? Those things should be articulated in a brief (one- to two-page) statement that is shared with the parties. Failing to show all of the work and the rationale for decisions makes campuses vulnerable, as it may be tantamount to engaging in a negligent process and undercuts the transparency needed to help the parties know and understand why and how a decision was reached.

6. BEING BLIND TO PERSONAL BIASES

We have a mantra for investigators that we share in all of our trainings: “You have no side other than the integrity of the process.” This does not mean that investigators do not or cannot render findings, but it does mean that their biases, whether positive or negative, cannot impact investigations or resolutions. We all have biases. Becoming a good Title IX investigator requires recognizing and understanding what those biases are, checking them at the door, and not allowing them to influence investigations. Failure to screen out, or neutralize, personal biases impairs the integrity of the process. Rather than detail the most common biases and how those impact investigations, we have chosen to focus more holistically on how to recognize, neutralize and possibly even overcome biases.

KEY POINTS

Address personal bias by:

- » *Nurturing an attitude of humility.*
- » *Nurturing a continuous curiosity about others and their points of view and experiences.*
- » *Understanding microaggressions and how to avoid and address them.*

Recognizing and understanding our personal biases effectively requires developing a sense of cultural competency. This starts with adopting a stance of cultural humility. It doesn’t mean pretending that we have no culture-influenced ideas or beliefs. We all come with unique experiences and ideas. The development of cultural humility involves recognizing that our perspective is one of many, and that we need to be open to seeing things from others’ perspectives.

We suggest addressing bias using the following three steps:

Step 1: Nurture an Attitude of Humility

Reducing personal bias starts with nurturing an attitude of humility in our interactions with those around us. Let’s face it: our work addressing and mitigating Title IX issues is difficult. Emotions can run high, misunderstandings abound, egos rise, and we often face emotional, hardened, or inflexible viewpoints or perceptions in the midst of conflicting details, expectations, and feelings.

Humility can be defined as a lack of arrogance, privilege, and entitlement. Investigators should refrain from lecturing or attempting to serve in a developmental role during interviews. This reminder is particularly true for student affairs professionals, who may be accustomed to using a “teachable moments” approach with students. Don’t insert “conduct counseling” into your investigation interviews or your investigation report.

Just recently, we reviewed a report that stated, “You have been found not in violation of the university’s sexual misconduct policy, but we strongly caution you about your sexual decision-making and the respect we expect you to show your potential partners.” Anything after the comma in that sentence is outside the role any investigator should play. This reflects a tendency to drift

out of your proscribed lane as an investigator; Stay in your lane. Allow others to focus on developmental and educational efforts if deemed appropriate for the situation. The investigators' role is to listen to and seek to understand the witnesses' and/or parties' perspectives while gathering facts and evidence, and working towards rendering an appropriate finding. From the investigative standpoint, this may seem like a lost opportunity, but to the interviewees, it can feel like biased judgment or criticism, or a failure to see things from their perspective.

Step 2: Nurture Continuous Curiosity

This second step is something we can do both before and during an investigation. It is an ongoing process of augmenting our understanding and experiences to better appreciate the nuances and uniqueness of those who come from a different background, gender, sexuality, culture, disability, heritage, generation, etc. from our own. Supplement and explore new ideas and ways of thinking. Exposure and knowledge will help foster an attitude of unbiased openness to the views or perspectives of those being interviewed.

“The investigators’ role is to listen to and seek to understand the witnesses’ and/or parties’ perspectives while gathering facts and evidence, and working towards rendering an appropriate finding.”

While investigators may have a general understanding of experiences common to certain groups (e.g., Middle Eastern students practicing Islam; family and extended family being particularly important to Latino and Hispanic groups; or experiences of oppression and discrimination in the psychology of the African-American population), it remains essential to not assume that the issues common to a certain group have been important to or experienced by a specific member of that population.

We are seeing a need for investigators to better understand that individuals who are gay, lesbian, bisexual, transgender, queer, or questioning often come to the investigation process with a history of being bullied, teased, and treated poorly by others. Individuals from these groups often report lower levels of perceived social acceptance and psychological and physical well being.¹ Investigators should tread carefully when exploring sexual identity and past events such as the coming-out process, support or rejection from friends and family, and overall social integration. Above all, they should avoid the assumption that a person's sexual identity must be a factor in the investigation, while also being curious as to whether they think it does, and if so, how.

We should be aware of differences in wealth, health care access, education, and experience as potential barriers to the successful establishment of rapport and trust. Asymmetry between the parties can be very disempowering in the investigation process, and we have to be conscious of how that plays out, and make appropriate attempts at leveling.

Those who come into a Title IX investigation may bring with them experiences related to either a physical or mental disability. Those experiences are important to understand, as they may affect the willingness of an individual to form rapport, share information, or engage in open communication with a person in a position of authority. Examples of disabilities may include mental health issues, deafness, the inability to walk, chronic pain, impairment in social interaction, or a thought disorder. Investigators may not be aware of a disability so it is important to keep bias in check by maintaining an open mind, recognizing that there may be a host of variables that could explain an interviewee's behavior, distrust, or lack of openness

1. Woodford, M., Howell, M., Silverschanz, P., & Yu, L. (2012). “That’s so gay!”: Examining the Covariates of Hearing this Expression Among Gay, Lesbian, and Bisexual College Students. *Journal of College Health*, 60, 429–434.

Step 3: Understand Microaggressions

Microaggressions are blind spots, or unconscious biases, that result in actions or statements that can be hurtful to those on the receiving end. Microaggressions are “brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership.”² These unintended slights can have serious implications and impact those of a different sex or gender, country, ethnicity, culture, or sexual orientation, or those who have a disability or mental illness. Relevant to this whitepaper, they can subject an investigation to allegations of bias.

The central challenge in addressing microaggression is understanding that these slights are often unintentional and may even be the result of a person in authority attempting to pay a compliment to someone as a way to build rapport. This creates the dual problems of a blind spot for the person in authority, as well as the common reaction of defensiveness (e.g., “Well, that certainly wasn’t what I meant. Why do they have to be so sensitive?”).

The issue of microaggressions in Title IX work may not be easy for investigators or coordinators to handle gracefully. Increased training to identify, intervene, and manage these behaviors and comments is needed. Subtle victim-blaming or a lack of trauma-informed practice are common culprits. When preparing questions in advance of interviews, it can be helpful to have a co-investigator review them to make sure they are neutral and do not come off in ways you do not intend. If, during interviews, you realize that a question is poorly framed, or has come off wrong, take it back. We all make mistakes. Talented investigators fix them before they cause more harm.

7. FAILING TO TREAT THE INVESTIGATION AS A HEARING

“If done correctly, a civil rights-based investigation process in which the investigators render a finding can constitute a ‘hearing’ that fulfills all the hallmarks of due process within the college and university setting.”

The last of the deadly sins is misunderstanding the nature of the investigative interview. Meeting with the parties to determine if policy was violated is an administrative hearing. Certainly, due process (or fair process, for private colleges) is critical to a fair and impartial resolution, but too many campuses view due process as something that’s required only in the hearing phase of a resolution, rather than throughout the resolution.

If done correctly, a civil rights-based investigation process in which the investigators render a finding can constitute a “hearing” that fulfills all the hallmarks of due process within the college and university setting. The hallmarks of due process using a traditional hearing-based model in the college and university setting are:

- » A resolution mechanism that substantially or materially complies with the school’s policies and procedures.
- » Advanced written notice to both reporting and responding parties of each of the allegations (charges, in student conduct language) prior to issuing a finding.
- » Opportunity for the parties to review all evidence and information that will be used to render a finding, prior to a final determination.
- » Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with unbiased and impartial decision-makers.
- » Opportunity for the parties to suggest questions that should be asked of witnesses and the other party(ies).

2. Sue, D. (2010). *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation*, p. xvi. Hoboken, NJ: Wiley.

- » A reasonable and rational decision based on the evidence presented.
- » Timely written notification of the outcome, with a brief supporting rationale, to both parties.

The hallmarks of an appropriate civil rights investigation in the college and university setting are:

- » A team of two well-trained, impartial investigators who (often) meet multiple times with the parties to gather information, testimony, and evidence.
 - The parties are provided ample opportunity to provide a list of witnesses and additional evidence.
- » Detailed and written notice to both parties of the allegations and each of the policies alleged to have been violated.
- » Meetings by the investigation team with all relevant witnesses.
- » Opportunity for the parties to provide investigators with a list of questions for the other party(ies) and/or witnesses that may be asked at the investigators' discretion.
- » Gathering of all available and relevant evidence by the investigators.
- » Opportunity for the parties to review all evidence and information that will be used to render a finding, either in written form or orally before the determination is finalized.
- » Opportunity for the parties to address each allegation and the evidence and information pertaining to those allegations with the decision-makers. On many campuses, the parties are provided with a copy of the draft investigation report for review and comment.
- » A reasonable and rational decision based on the evidence presented.
- » A finding or recommendation on each alleged violation by the investigators, who met and/or spoke with the parties and the witnesses, and who examined all relevant evidence.

This represents a robust, thorough, efficient, and impartial process, and is how a civil rights investigation is properly performed to fulfill the elements of due process. How is this not a “hearing” or a robust “opportunity to be heard?” It is.

CONCLUSION

This whitepaper has provided a detailed review of what we call the *Seven Deadly Sins of Title IX Investigations*. These are far from the only mistakes or problems that can undermine or significantly impair an investigation, but they are among the most common. They are also problems that can be addressed and, hopefully, eliminated from your practice via attention and intention. While the process of becoming a professional civil rights investigator can take a lifetime to achieve, we hope you will view the opportunity to improve skills as a process of constant enhancement and refinement, as we do with our own investigation techniques and practices.

For those of you looking for more great suggestions than can be offered in a short whitepaper, we hope you will join ATIXA, which features an Investigator Community of Practice (<https://atixa.org/join/communities-of-practice/>). We also hope you will consider the foremost guidebook on campus/school civil rights investigations, the *ATIXA Investigation in a Box Kit*, a 230-page guide written by the authors of this whitepaper that covers the whole range of investigation best practices (<https://atixa.org/resources/investigation-in-a-box/>).

REFERENCES

- Sue, D. (2010). *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation*. Hoboken, NJ: Wiley.
- Woodford, M., Howell, M., Silverschanz, P., & Yu, L. (2012). "That's so gay!": Examining the Covariates of Hearing this Expression Among Gay, Lesbian, and Bisexual College Students. *Journal of College Health*, 60, 429–434.

ABOUT THE AUTHORS



W. Scott Lewis, J.D. is a Partner with The NCHERM Group, LLC., and formerly served as the Assistant Vice Provost at the University of South Carolina. He is the 2012–2014 past-president of NaBITA, the National Behavioral Intervention Team Association (www.nabita.org), an organization he co-founded. He also serves as an advisory board member and co-founder of ATIXA. He is a frequent keynote and plenary speaker, nationally recognized for his work on behavioral intervention for students in crisis and distress, and has trained thousands of faculty and staff in these areas. He is noted as well for his work in the area of classroom management and dealing with disruptive students. He presents regularly throughout the country, assisting colleges and universities with legal, judicial, and risk management issues, as well as policy development and implementation. He serves as an author and editor in a number of areas, including legal issues in higher education; campus safety and student development; campus conduct board training; and other higher education issues. He is a member of NASPA and the American College Personnel Association, or ACPA, and served as a past-president of ASCA, the Association for Student Conduct Administration. He completed his undergraduate work in psychology and his graduate work in higher education administration at Texas A&M University and received his law degree and mediation training from the University of Houston. He currently serves as president of SACCA, the Student Affairs Community College Association (www.sacca.org/home/about/).



Sandra K. Schuster, J.D. is a Partner with The NCHERM Group, LLC. She was formerly the General Counsel for Sinclair Community College in Dayton, Ohio, and Senior Assistant Attorney General for the State of Ohio in the Higher Education Section. She is a recognized expert in preventive law for education, notably in the fields of sexual misconduct, the First Amendment, disability law, risk management, student discipline, campus conduct, intellectual property, and employment issues. Prior to practicing law, she served as the Associate Dean of Students at The Ohio State University. She served as the 2010–2012 president of NaBITA, and is a past-president of ASCA. She currently serves on the Board of Directors for NaBITA. She is a frequent presenter on legal, employment, and student affairs issues for higher education, and has authored books, articles, and journals. She holds masters' degrees in counseling and higher education administration from Miami University, completed her coursework for her doctoral degree at The Ohio State University, and was awarded her juris doctorate degree from the Moritz College of Law at OSU. She currently serves as Executive Director of SACCA. She is also a co-founder of ATIXA and a member of its advisory board.



Brett A. Sokolow, J.D. is a higher education attorney who specializes in high-risk campus health and safety issues. He is recognized as a national leader on campus sexual violence prevention, response, and remediation. He is the President and CEO of The NCHERM Group, LLC., which serves as legal counsel to 70 colleges and universities, has provided services to more than 3,000 college and university clients, and has trained more than 700 conduct hearing boards at institutions across North America. He is also the Executive Director of ATIXA. He frequently serves as an expert witness on sexual assault and harassment cases, and has authored 12 books and more than 100 articles on campus safety and sexual assault. The ATIXA Model Sexual Misconduct Policy serves as the basis for policies at hundreds of institutions across the country. He served as the Executive Director of NaBITA until 2015, and now chairs its Advisory Board. He is a graduate of the College of William & Mary and the Villanova University School of Law. He is a member of the advisory boards of the National Hazing Prevention Collaborative, the NASPA Enough Is Enough Campaign, and SACCA.



Daniel Swinton, J.D., Ed.D. serves as Managing Partner of The NCHERM Group, LLC., and the Senior Associate Executive Director of ATIXA. He consults frequently with colleges and universities and extensively trains on issues of Title IX, The Clery Act/VAWA Section 304, sexual violence, employment issues, alcohol and other drugs, behavioral intervention, prevention, disciplinary policies and procedures, hearing boards, and legal issues in higher education. He often serves as an external investigator for institutions on Title IX issues, harassment and discrimination, employment concerns, retaliation, and complex student conduct matters. He has also authored a number of peer-reviewed articles and book chapters. Prior to joining ATIXA and The NCHERM Group, LLC., he served as Assistant Dean and Director of Student Conduct and Academic Integrity at Vanderbilt University. He received his bachelor's degree from Brigham Young University, his law degree from the J. Reuben Clark Law School at BYU, and a doctorate in higher education leadership and policy from Vanderbilt University's Peabody College. He also served as President of ASCA in 2010–2011. He is a member of the Tennessee State Bar.



Brian Van Brunt, Ed.D. is the Senior Executive Vice President for Professional Program Development with The NCHERM Group, LLC. He is a past-president of the American College Counseling Association (ACCA), the 2014–2015, President of NaBITA and currently its Executive Director. He also serves as Managing Editor of *The Journal of Campus Behavioral Intervention (J-BIT)*, *The Journal of Campus Title IX Compliance and Best Practices (Campus IX)*, and *Student Affairs eNews (SAeN)*. He has a doctoral degree in counseling supervision and education from the University of Sarasota/Argosy and a master's degree in counseling and psychological services from Salem State University. He has served as the director of counseling at New England College and Western Kentucky University. He is the author of several books, including *Harm to Others: The Assessment and Treatment of Dangerousness*, *Ending Campus Violence: New Approaches in Prevention*, and *A Faculty Guide to Addressing Disruptive and Dangerous Behavior in the Classroom*. He recently developed the Structured Interview for Violence Risk Assessment (SIVRA-35), a starting place for law enforcement, clinical staff, and administrators to conduct a more standardized, research-based violence risk assessment with individuals determined to be at an increased risk.



Michael Henry, J.D. is the lead Title IX Investigator and Director of the Student Resolution Center at Texas Tech University and an affiliated consultant with The NCHERM Group, LLC. He investigates and adjudicates cases of sexual assault, sexual harassment, gender violence, and relationship violence. He also investigates incidents of hazing and other forms of organizational misconduct within the university's Greek community. With an undergraduate degree in philosophy and a law degree from Texas Tech University, he has experience in civil litigation and worked in the Appellate Division of the Lubbock District Attorney's Office. He has developed and implemented student-focused Title IX policies and procedures at Texas Tech, and provided education and prevention programming to faculty, staff, and students. Additionally, he has authored and revised extensive portions of the university's conduct policy and procedure, trained University Discipline Committees, and developed online content related to Title IX and sexual misconduct. He has also authored and revised institutional and system-wide operating policies related to discrimination, harassment, and Title IX. He has advised other member institutions within the Texas Tech System and has trained several system conduct offices and university discipline committees. He has also served as a faculty fellow at the ASCA Gehring Academy and presented at the ATIXA/SCOPE Joint National Conference.



Leslee Morris, J.D. is an Affiliated Consultant with The NCHERM Group, LLC., and a Title IX Investigator for the San Diego Community College District. She serves on the ATIXA Advisory Board. She received her Juris Doctorate degree and mediation training from the University of Colorado School of Law. She was admitted to the Colorado Bar in 2000 and served as an Associate in CU's Office of University Counsel, specializing in employment discrimination cases. She also served for nine years as an investigator in the Student Conduct Office at CU, specializing in civil rights-based grievances. She was also the Title IX Compliance and Grievances coordinator for National University in San Diego. Prior to attending law school, she served as a policy analyst for a nonprofit organization in New York City, where she specialized in child welfare and juvenile justice issues. She is a co-author of *Youth Involvement in the Child Welfare and Juvenile Justice Systems: A Case of Double Jeopardy?*

THE ASSOCIATION OF TITLE IX ADMINISTRATORS

ATIXA is a professional association for school and college Title IX coordinators and administrators who are interested in serving their districts and campuses more effectively. ATIXA brings campus and district Title IX coordinators and administrators into professional collaboration to explore best practices, share resources, and advance the worthy goal of gender equity in education.

www.atixa.org



A Publication of ATIXA
©2016, ATIXA. | All rights reserved.